



S T A T E B A R O F M I C H I G A N

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From:    Janet K. Welch, Executive Director  
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Date:    March 8, 2011

Re:    SB 191 (Caswell) Attorney Contingency Fees  
    Senate Judiciary Committee Hearing

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The State Bar of Michigan's Board of Commissioners has not met since the introduction of SB 191 to formally adopt a position. However, the State Bar has opposed similar legislation in previous legislative sessions. Based on historical positions, it is anticipated the State Bar will oppose SB 191.

Consistent with its constitutional authority for supervision of the courts and regulation of the profession, the Michigan Supreme Court has addressed the issue of contingency fees in Michigan Rules of Professional Conduct 1.5 and Michigan Court Rule 8.121, both of which are enclosed. Any changes concerning contingency fees are most appropriately addressed through changes to these rules.

The State Bar has also opposed similar legislation based on the concern that it will limit the ability of people who have suffered grievous harm from negligent acts to get relief. Contingency fees permit the often substantial cost of determining whether a particular injury or death is actually due to negligence and of preparing to establish the facts in court to be borne largely by the lawyer who takes the case rather than by the injured party. In exchange for the possibility of a percentage of an award, if there is one, the lawyer is assuming the risk of a particular injury turning out to be not due to negligence, or difficult or impossible to prove. This is a textbook example of an efficient economic arrangement, freely arrived at within the ethical constraints imposed by the rules of professional conduct.

If you would like to discuss this position in further detail or have questions, please contact us directly at your convenience.



## **Michigan Rules of Professional Conduct**

### **Rule 1.5 Fees**

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the result obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;  
and
- (8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or by other law. A contingent-fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent-fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee in a domestic relations matter or in a criminal matter.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the client is advised of and does not object to the participation of all the lawyers involved;  
and

(2) the total fee is reasonable.

#### Comments - Rule 1.5

#### **Basis or Rate of Fee**

[1] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

#### **Terms of Payment**

[2] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

[3] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage. See MCR 8.121

## **Division of Fee**

[4] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee on agreement between the participating lawyers if the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive.

## **Disputes over Fees**

[5] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

# **Michigan Court Rules**

## **Rule 8.121 Contingent Fees in Claims or Actions for Personal Injury and Wrongful Death**

- (A) Allowable Contingent Fee Agreements. In any claim or action for personal injury or wrongful death based upon the alleged conduct of another, in which an attorney enters into an agreement, expressed or implied, whereby the attorney's compensation is dependent or contingent in whole or in part upon successful prosecution or settlement or upon the amount of recovery, the receipt, retention, or sharing by such attorney, pursuant to agreement or otherwise, of compensation which is equal to or less than the fee stated in subrule (B) is deemed to be fair and reasonable. The receipt, retention, or sharing of compensation which is in excess of such a fee shall be deemed to be the charging of a "clearly excessive fee" in violation of MRPC 1.5(a).
- (B) Maximum Fee. The maximum allowable fee for the claims and actions referred to in subrule (A) is one-third of the amount recovered.
- (C) Computation.
  - (1) The amount referred to in subrule (B) shall be computed on the net sum recovered after deducting from the amount recovered all disbursements properly chargeable to the enforcement of the claim or prosecution of the action. In computing the fee, the

costs as taxed and any interest included in or upon the amount of a judgment shall be deemed part of the amount recovered.

- (2) In the case of a settlement payable in installments, the amount referred to in subrule (B) shall be computed using the present value of the future payments.
  - (a) If an annuity contract will be used to fund the future payments, "present value" is the actual cost of purchasing the annuity contract. The attorney for the defendant must disclose to the court and the parties the amount paid for the annuity contract, after any rebates or other discounts.
  - (b) If the defendant will make the future payments directly, "present value" is the amount that an entity of the same financial standing as the defendant would pay for an annuity contract. The court may appoint an independent expert to certify the "present value" as defined in this paragraph. The court may base its findings on the expert's testimony or affidavit.
- (D) **Agreements for Lower Fees.** An attorney may enter into contingent fee arrangements calling for less compensation than that allowed by subrule (B).
- (E) **Advice to Client.** An attorney must advise a client, before entering into a contingent fee arrangement, that attorneys may be employed under other fee arrangements in which the attorney is compensated for the reasonable value of the services performed, such as on an hourly or per diem basis. The method of compensation used by an individual attorney remains the attorney's option, and this rule does not require an attorney to accept compensation in a manner other than that chosen by the attorney.
- (F) **Agreements to be in Writing.** Contingent fee arrangements made by an attorney with a client must be in writing and a copy provided to the client.
- (G) **Applicability.** This rule does not apply to agreements reduced to writing before May 3, 1975. The one-third provision of subrule (B) applies to contingent fee agreements entered into after July 9, 1981. Earlier agreements are subject to the rule in effect at the time the agreement was made.